teachers to be employed in the school under rule 5A(1) and in any event the only result of employing an extra teacher would be under rule 5A(2) the loss of the grant towards the cost of the salary of such teacher.

In these circumstances there could be no question of rules 5 or 6 of the 1961 Rules applying so as to jeopardise the whole of the grant-in-aid. Some reliance was placed by the respondents' counsel on the trial judge's finding that the school could only employ a limited number of junior middle class teachers and the reference in a letter from the chairman of the education committee to the appellant, dated 10th October 1962 to the school "being limited by the quota of teachers". But these statements are quite unspecific and do not show in any way why it became necessary to dismiss the appellant.

In their Lordships' opinion the respondents have failed to justify the appellant's dismissal in terms of clause 4 of the contract. In the result the appeal succeeds upon this point.

There was a procedural point as to the defendant parties taken in the courts below which was but faintly argued before the board. In the first instance the proceedings were directed against "the educational sub-committee, the Chinese Chamber of Commerce, Sandakan" and three individuals as signatories to the letter of dismissal to the appellant. A preliminary point was taken before the judge that as the education sub-committee was an unincorporated body they could not be sued as such. In response to an order of the judge an application to amend the proceedings was made so as to make 12 individuals defendants as members of the management committee. Two of these defendants were ultimately struck out and upon this being done and no objection being taken by the defendants' counsel the court on 26th February 1964 granted the application to substitute the present defendants. The point was not further referred to in evidence and in their Lordships' opinion it is now too late for the respondents to raise any question as to whether they are the proper parties to be sued. Upon the information before the board there is in any case no substance in the point.

Their Lordships will report to the Head of Malaysia their opinion that the appeal should be allowed, the order of the Federal Court of Malaysia, dated 8th October 1964 set aside and the order of Harley J. in the High Court in Borneo, dated 14th May 1964 restored and that the respondents should pay the appellant's costs in the Federal Court and of this appeal.

Appeal allowed.

Solicitors: *Coward, Chance & Co.; Kingsley & Co.*

KHOO AH YEOW v. THE OVERSEAS UNION BANK LTD.

[F.C. (Azmi C.J. (Malaya), Pike C.J. (Borneo) and Yong J.) March 2, 1967]

[Penang — Federal Court Civil Appeal No. X.14 of 1966]

Practice and Procedure — Appeal — Appeal from the decision of Rent Assessment Board to High Court and appeal from High Court to Federal Court — Points not pleaded or argued before the High Court cannot be urged before the Federal Court.

A party ought not to be allowed to be harrassed by a superior court on a point which either was never raised or deliberately abandoned in the court below although exceptional circumstances may justify a departure from this rule.

In this case as the appellants questioned the decision of the Rent Assessment Board on matters though raised before the board were not pleaded or argued before the High Court the appeal should be dismissed as no exceptional circumstances existed in this case.

[Editorial Note: on "Points not taken in court below" see *Mallal's* Supreme Court Practice vol. I p. 917.]

Cases referred to:—

(1) *Tay Yew Heng* v. *Lee Thean Lai* [1959] M.L.J. 78.

(2) *Banbury* v. *Bank of Montreal* [1918] A.C. 626.

(3) *North Staffordshire Rly. Co.* v. *Edge* [1920] A.C. 254, 269.

(4) *Smith* v. *Caswell Laird & Co.* [1938] 2 K.B. 700, 725.

(5) *Connecticut Fire Insurance Co.* v. *Kavanagh* [1892] A.C. 473, 480.

(6) *Southerland* v. *Thomson* [1906] A.C. 51, 55.

(7) *Hoong Chin Wah* v. *Cheah Kum Swee & Anor.* [1967] 1 M.L.J. 163.

(8) *Ghulam Sarwar & Anor.* v. *Nayaz Ali & Ors.* A.I.R. 1921 Oudh 41.

(9) *Kalyan Das* v. *Maqbul Ahmad* I.L.R. 40 All. 497; A.I.R. 1918 P.C. 53.

FEDERAL COURT.

Lim Kean Siew for the appellant.

C. O. Lim for the respondent.

Cur. Adv. Vult.

Azmi C.J. (Malaya): This is an appeal against the judgment of the High Court at Penang, dismissing the appeal of the appellant hereinafter referred to as Khoo, against the decision of the Penang Rent Assessment Board.

Khoo at the relevant date was a tenant of the premises known as No. 365 Penang Road, the property of the Overseas Union Bank Ltd., hereinafter referred to as the bank.

On 12th March, 1963, the bank applied to the board for the recovery of the said premises on the ground that it intended to demolish the premises and on the same site to rebuild a four storey building comprising of a shop and flats, under paragraph (m) of sub-section (1) of section 12 of the Control of Rent Ordinance, 1956.

The bank had served on Khoo a notice to quit on 30th August, 1962.

The bank maintained that the erection of

the proposed new building would relieve the housing shortage in the City of George Town and would enable the City Council to obtain more rates and taxes.

At the hearing before the board, evidence was given by the town planner, Penang, to the effect that the present building fell short of the requirements of the building bye-laws now in force in Penang and has a bucket sanitary system. But on the other hand, the City Council would insist that the proposed building must have the modern sanitation system. This, according to the town planner would be in the public interest.

The architect who prepared the lay-out plan of the new building in his evidence stated that the new building would in his opinion be in the public interest because it would enhance the beauty of the town and would also match with the new market and this new building would of course, have the modern sanitary system. The lay-out plan of the new building had been approved by the City Council of George Town.

Khoo stated that the new building would only benefit the rich as the poor people would not be able to pay for the premium and that he would lose the good-will of his customers who consisted of housewives.

The board after hearing both parties held the view that it would be contrary to the public interest to refuse the application by the bank, and it therefore granted the necessary certificate under paragraph (m) of sub-section (1) of section 12 of the Ordinance.

Against that decision Khoo appealed to the High Court, but on a new ground of appeal namely, I quote his exact words:—

"that the application was made by fraud or mis-representation in that the applicants (i.e. the bank) have failed to disclose that they served a notice to quit on the respondent (i.e. Khoo) in 1961 under section 12(6) and such notice is material to the question of intention."

I should interrupt here and explain that the reference to "section 12(6)" is a misprint for "section 12(1)(f)."

Now, section 12(1)(f) reads as follows:—

12. (1) No order or judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the following cases, namely —

x x x x x x

(f) where the owner of the premises reasonably requires the same for occupation by himself or any member of his family or any person for whom he holds the premises in trust, and

(i) there has been no change by purchase in the ownership of the premises since the fifteenth day of February, 1942; or

(ii) the tenancy has been determined by not less than one year's notice to quit and there has been no change by purchase in the ownership of the premises within one year next preceding the date of such notice.

Provided that an order or judgment shall not be made or given on any ground specified in this paragraph if the court is satisfied that, having regard to all the circumstances of the case, including the question whether other accommodation is available for the owner or the tenant, greater hardship would be caused by granting an order or judgment than by refusing to grant it.

Provided further that in the case of premises being used by the tenant for business, trade or professional purposes an order or judgment shall not be made or given on any grounds specified in this paragraph unless the court is satisfied that the owner requires them for the purpose of carrying on his own business, trade or profession.

x x x x x x

The High Court dismissed the appeal firstly on the ground that the grounds of fraud or mis-representation raised before it were not pleaded at the hearing before the board and there was no evidence on the record in reference to such allegations. The second ground was that the High Court would not intervene except where the board, in granting a certificate under paragraph (m) sub-section (1) of section 12, had acted on a misconception of law. See *Tay Yew Heng* v. *Lee Thean Lai.*[1]

The High Court also pointed out that what Khoo should have done if he intended to raise the question of fraud, mis-representation or mistake he should have asked the board to review its decision under section 9 of the Ordinance.

Perhaps it is convenient to state here that under section 11 of the Ordinance an appeal from any decision of the board shall lie only on a point of law.

Khoo now appeals against the decision of the High Court and his grounds of appeal read as follows:—

1. "That the Rent Assessment Board misdirected itself on the meaning and purport of the words 'public interest' and therefore they have misdirected themselves on the law or that they had exceeded the jurisdiction conferred upon them by the said Ordinance.

2. That the Rent Assessment Board in reaching the conclusion that it was in the public interest that the respondents be allowed to demolish the existing buildings for the purpose of rebuilding, took into consideration matters which they ought not to have taken into consideration and that in so doing they had misdirected themselves.

3. That there was no, or no sufficient, evidence to warrant the finding of the Rent Assessment Board that the respondents' proposal was in the public interest and that in holding that there was evidence or that there was sufficient evidence they had erred and was wrong in law."

It will be seen now that the grounds of appeal before this court were the same grounds which were urged before the board but abandoned before the High Court.

The question this court has to decide now is whether we should allow Khoo to do that. His counsel cited to us: (1) *Banbury* v. *Bank of Montreal* [2]; (2) *North Staffordshire Railway Co.* v. *Edge* [3]; (3) *Smith* v. *Caswell Laird &*

Co.[4] and (4) *Connecticut Fire Insurance Co.* v. *Kavanagh.*[5]

In the *Banbury* v. *Bank of Montreal* case the headnote states that the question whether the Court of Appeal should allow a point of law not raised in the court of first instance to be raised on appeal goes, not to jurisdiction, but to discretion, and it would be open to the Court of Appeal to order judgment to be entered for the defendant bank on the ground of no evidence, notwithstanding that the point had not been raised at the trial.

In the *North Staffordshire Railway Co.* v. *Edge* case, Lord Atkinson cited the following passage taken from the speech of Lord Watson in the *Connecticut Fire Insurance Co.* v. *Kavanagh*:—

"When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than the courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the plea."

As stated by Lord Halsbury in *Southerland* v. *Thomson* [6]:—

"I should have felt more difficulty about the other point if it had been raised in the court below. I do not in the least mean to say that it is an absolute objection against a good point, if it is a good point, to say that it has not been raised in the court below, because this House ought to make such an order as ought to have been made originally. But the peculiarity of this case is that this is a question which could only have been settled by proof, and we are asked to overrule the judgment of the court of Session by a suggestion on which, if it was well founded, the court might have been asked to reverse the proceedings before the Lord Ordinary and to order a proof."

In the present case, the points raised before us were raised before the board where this matter originated.

We were also referred to a recent judgment of this court in *Hoong Chin Wah* v. *Cheah Kum Swee & Anor.*[7] and in that judgment this court referred to the case of *Ghulam Sarwar & Anor.* v. *Nayaz Ali & Ors.*[8] In that suit the plaintiff claimed for a share in the estate of his deceased brother under Muslim law and in the alternative for a declaration that he was entitled to the property after the death of the widow who was held by the court to succeed to the entire property of the deceased under a family custom. On appeal to the district court the plaintiff contented himself with arguing the appeal on the question of his right to succeed as a brother of the deceased but did not argue though he still pleaded on the question for the declaratory relief. When he lost his appeal before the district court he appealed to the Judicial Commissioner's Court and this time asked to be allowed to argue his appeal on his claim for declaratory relief only. The Judicial Commissioner refused and I quote a passage from that judgment:—

"The appellant cannot be allowed to urge his appeal on this ground. It is not a mere question of an admission on a point of law as suggested by the appellant. The principle is that a party ought not to be allowed to be harassed by a superior court on a point which was either never raised or deliberately abandoned in the court below. The principles laid down by the Privy Council in *Kalyan Das* v. *Maqbul Ahmad* [9] are equally applicable to a High Court. They lay down in that case that the High Court ought not to be liable to have its determinations overruled upon matters never submitted to it, and that the same principle applied to a point which, though mentioned in the grounds of appeal, the appellant's advocate deliberately elected not to press. It is possible that there may be exceptional circumstances which might justify a departure from this rule but no such circumstances exist in this case."

In my own view on the principle stated in the *Ghulam Sarwar* case I would refuse to allow the appellant to argue the appeal on the ground raised before the board but totally abandoned before the High Court.

I would therefore dismiss the appeal with costs.

Yong J. concurred.

Pike C.J. (Borneo): I have had the advantage of reading the judgment of Azmi, Chief Justice, Malaya, and I agree with his conclusion.

I would only wish to emphasise that though this purports to be an appeal from the decision of the High Court the grounds on which the appellant relies in his memorandum question the correctness of the decision of the board and not that of the High Court. Furthermore they question the decision of the board on matters which though raised before the board were not pleaded or argued before the High Court.

To permit the appellant in the circumstances of this case, to argue this appeal on the grounds pleaded would, in my view, be to enlarge the right of appeal beyond that conferred by the statute and thereby give to the appellant two bites at the cherry by enabling him to challenge the decision of the board before different tribunals on different grounds.

Section 11(1) of the Control of Rent Ordinance 1956 gives the appellant only a limited right of appeal against the decision of a board — namely an appeal only on a point of law. The appellant exhausted and wasted that right, which is required to be exercised within 14 days of the decision, when he lodged his appeal to the High Court on a ground which raised a question of fact and not law and which did not raise the questions which he seeks to raise in this court.

The appellant's right to come to this court is provided in section 67 of the Courts of Judicature Act, 1964, in the following words:—

"The Federal Court shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to the provisions of this or any other written law regulating the terms and conditions upon which such appeals shall be brought."

Since in this appeal no grounds are pleaded which question the correctness of the decision of the High Court no right of appeal to this court appears to me to have arisen and I am of opinion that this court cannot therefore entertain the appeal.

Appeal dismissed.

Solicitors: *Lim Kean Siew & Co.; Lim, Lim & Oon.*

KARAM SINGH v. PUBLIC PROSECUTOR

[F.C. (Barakbah L.P., Azmi C.J. (Malaya), Ong Hock Thye F.J.) March 6, 1967]

[K.L. — Federal Court Criminal Appeal No. X.41 of 1966]

Penal Code s. 302 — Murder — Circumstantial evidence — Contradictions in evidence of key prosecution witness — Hearsay evidence — Admissibility of.

Criminal Procedure — Summing up to jury — Failure of prosecution to prove threat — Witnesses not made available to defence — Adverse presumption against appellant — Criminal Procedure Code, (Cap. 6), s. 214(iii) — Duties of trial judge thereunder.

Evidence — Circumstantial evidence — Hearsay evidence — Evidence Ordinance, 1950, ss. 8, 32(1) and 103.

The appellant was convicted of murder and sentenced to death under section 302 of the Penal Code. His conviction was based entirely on circumstantial evidence. At the trial, the deceased's son gave evidence that his father had told him of a quarrel between him and the appellant on the night before he was killed. He contradicted his evidence under cross-examination on several material facts. It was alleged that there were threats uttered by the appellant, on the fatal night. and that abuse preceded the threats. It was also alleged that there were 30 to 40 independant witnesses, who have heard the murderous threats uttered. None of them was called as a witness, and the learned trial judge's directions were as follows: "If the police have taken statements from witnesses, they have to produce them as witnesses if they are of any assistance to the prosecution case. If they do not wish them to be called as their witnesses, they are under a duty to make them available to the defence. From the record of the preliminary enquiry I see that the prosecution had made eight witnesses available to the defence". The learned trial judge in the course of summing up also commented upon the failure of the defence to tender evidence to prove that no threat had been uttered by the appellant.

Held: (1) all the evidence of the deceased's son even if true, being hearsay, was inadmissible and should not have been allowed to influence the jury in arriving at their verdict;

(2) at the close of the prosecution case, there was nothing on the record to show that any of the persons said to have been made available to the defence at the preliminary enquiry were tendered or made available at the trial. From the failure of the prosecution to call material witnesses the jury were in effect directed that they could, if they so desired, draw an unfavourable inference against the appellant, since he could have called them to prove that no threats were uttered in their presence and hearing as alleged. This again was a misdirection of a grave and prejudicial nature;

(3) there was nothing in the summing up said in favour of the appellant when much could be said in the appellant's favour. The fact that he went straight to his own house knowing he was seen, was itself a refutation of the allegation that he was running away and more consistent with innocence than guilt;

(4) the real question which the jury had to decide was whether or not the explanation given by the appellant as to the blood stains on his shirt and trousers might reasonably and probably have been true. In effect the jury were told to decide whether or not they believed the appellant — a wrong criterion as to onus;

(5) the direction as to the failure of the appellant to protest his innocence at the first reasonable opportunity hardly set out the facts in true perspective. The jury had wrongfully assumed that the accusation was made before the crowd and so long as this remained uncorrected in the minds of the jury the direction was highly prejudicial to the accused;

(6) in a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused. The judge had omitted to view the relevant facts from all angles and the case was not put to the jury in a way to ensure due appreciation of the value of the evidence. There had been a miscarriage of justice and the appeal must be allowed.

Observations on the standard of proof required from the prosecution at the end of the presentation of its case.

Cases referred to:—

(1) *In re Eddula Venkata Subha Reddi*, (1931) I.L.R. 54 Mad. 931; A.I.R. 1931 Mad. 689.

(2) *In re Ravupalli Ramamurthy*, A.I.R. 1941 Mad. 290, 291.

(3) *Mahinder Singh* v. *Public Prosecutor* [1967] 1 M.L.J. 126.

(4) *R.* v. *Thomas Finch*, 12 Cr. App. R. 77, 79.

(5) *R.* v. *Bundy*, 5 Cr. App. R. 270.

(6) *Soo Sing* v. *Public Prosecutor* [1951] M.L.J. 143.

(7) *R.* v. *Koh Soon Poh* [1935] M.L.J. 120, 122.

(8) *R.* v. *Attfield* [1961] 1 W.L.R. 1135.

FEDERAL COURT.

Dato' David Marshall (*V. Jeyaratnam* with him) for the appellant.

Abdul Kadir bin Haji Mohamed Kassim (Deputy Public Prosecutor) for respondent.

Ong Hock Thye F.J.: The appellant appealed against his conviction in the High Court at Ipoh of the murder of one Mohan Singh, a mental hospital attendant, for which he was sentenced to death under section 302 of the Penal Code. We allowed his appeal and now state the grounds of our decision.

According to the charge the murder was alleged to have been committed between 5 a.m. and 5.50 a.m. on April 29, 1966, that is to say, before day-break. There was no eye-witness of